(7)

No.03-9659

Supreme Court, U.S.
FILED
MAY 2 8 2004
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

THOMAS JOE MILLER-EL,
Petitioner,

v.

DOUG DRETKE, Director,
Texas Department of Criminal Justice,
Criminal Institutions Division,
Respondent.

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

GREG ABBOTT
Attorney General of Texas

BARRY R. McBEE
First Assistant Attorney General

DON CLEMMER
Deputy Attorney General
For Criminal Justice

*GENA BUNN
Chief, Postconviction Litigation Division
Assistant Attorney General

P. O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 936-1400

ATTORNEYS FOR RESPONDENT

* Counsel of Record

CAPITAL CASE

QUESTION PRESENTED

Whether the court of appeals acted consistently with this Court's prior opinion in determining – in light of the voir dire record in its entirety and all relevant evidence – that Miller-El has failed to show that the state courts' rejection of his *Batson* claim is unreasonable and has failed to rebut, by clear and convincing evidence, the state court's finding of no purposeful discrimination.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 2

ARGUMENT 5

I. The Question Presented for Review Is Unworthy of the Court's Attention. 5

II. As the Court below Correctly Determined, Miller-El Has Failed to Show That the State Courts' Rejection of His Batson Claim Is Unreasonable, Nor Has He Rebutted, by Clear and Convincing Evidence, the State Court's Finding of No Purposeful Discrimination. 6

A. The record supports the trial judge's finding that prosecutors struck prospective jurors based on their views, not on race. 8

B. Miller-El has failed to identify any white jurors accepted by the State who were similarly situated to the African-American jurors struck by the State. 16

C. Prosecutors did not engage in disparate questioning based on race. 21

1. Graphic Script 22

2. Minimum Punishment 25

D. The lower court correctly concluded that Miller-El's evidence of historical discrimination in Dallas County and evidence of prosecutors' use of jury shuffles – while marginally relevant – was insufficient to compel rejection of the trial judge's finding. 27

CONCLUSION 30

TABLE OF AUTHORITIES

Cases **Page**

Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977) 8

Batson v. Kentucky, 476 U.S. 79 (1986) ..... *passim*

Caldwell v. Maloney, 159 F.3d 639 (1st Cir. 1998) 15

Chambers v. State, 784 S.W.2d 29 (Tex. Crim. App. 1989) 15,30,31

Hernandez v. New York, 500 U.S. 352 (1991) 7,8,9,16

Matthews v. Evatt, 105 F.3d 907 (4th Cir. 1997) 17

McCleskey v. Kemp, 481 U.S. 279 (1987) 9

Patton v. Yount, 467 U.S. 1025 (1984) 16

Purkett v. Elem, 514 U.S. 764 (1995) 7,31

Swain v. Alabama, 380 U.S. 202 (1965) 4,5,15,29

Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981) 7,31

United States v. Lance, 853 F.2d 1177 (5th Cir. 1988) 17

Wainwright v. Witt, 469 U.S. 412 (1985) 14,16

Constitutions, Statutes and Rules

U. S. Const., amend. XIV 3,4

28 U.S.C. § 2254 ..... *passim*

Sup. Ct. R. 10 6-7

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

In an opinion issued on February 25, 2003, this Court concluded, based on a "threshold examination" of the record in this case, that the federal district court's rejection of Petitioner Thomas Joe Miller-El's *Batson*[1] claim was "debatable" and thus that the court of appeals had erred in not granting a certificate of appealability on the claim. Petitioner's Appendix (Pet. App.) at 44a (*Miller-El v. Cockrell*, 537 U.S. 322 (2003)). As Justice Scalia noted in his concurring opinion, however, the "conclusion that there is room for debate as to the merits of petitioner's *Batson* claim is far removed from a judgment that the State's explanations for its peremptory strikes were implausible." Pet. App. at 50a. Thus, the Court remanded the case to the court below to determine whether Miller-El could "demonstrate that [the] state court's finding of the absence of purposeful discrimination was incorrect by clear and convincing evidence, 28 U.S.C. § 2254(e)(1), and that the corresponding factual determination was 'objectively unreasonable' in light of the record before the court." Pet. App. at 44a. Only then would he be entitled to federal habeas corpus relief.

Miller-El now seeks review of the court of appeals' opinion on remand from this Court affirming the district court's denial of relief. Miller-El accuses the court below of "flout[ing]" this Court's "explicit guidance" and "ignoring its explicit direction" in its treatment of Miller-El's claim, urging this Court to intervene to preserve its supervisory authority. He asserts also that the lower court misapplied *Batson* and 28 U.S.C. § 2254 in affirming the denial of relief. Miller-El's accusation is unfounded, however, as the court of appeals conscientiously followed the dictate of this Court's remand. The lower court granted a certificate of appealability, ordered full merits briefing from the parties, and conducted oral argument; then, "[h]aving carefully reviewed the record in this case, the parties' respective briefing and arguments," the court issued a well-reasoned, exhaustive opinion concluding

---

[1] *Batson v. Kentucky*, 476 U.S. 79 (1986).

that Miller-El "failed to show by clear and convincing evidence that the state court erred in finding no purposeful discrimination." Pet. App. at 22a. Furthermore, contrary to Miller-El's suggestions, the court below neither discounted certain evidence as irrelevant nor accepted "without question" the state court's credibility determinations; rather, the court considered all relevant evidence but found it insufficient in the final analysis to overcome the state trial judge's finding that prosecutors struck prospective jurors, not because of their race, but because of their unfavorable case-related views. Finally, Miller-El's argument that the court below misapplied *Batson* and § 2254 amounts to nothing more than a conclusory assertion that, because the court affirmed the denial of relief, it *must have* misapplied *Batson* and § 2254. Miller-El's petition for writ of certiorari should be denied.

STATEMENT OF THE CASE

In the pre-dawn hours of November 16, 1985, Thomas Joe Miller-El and co-defendant Kennard Flowers robbed a Dallas motel at gunpoint. Motel employees Donald Hall and Doug Walker complied with all Miller-El's demands, handing over the cash drawer, opening the combination lock to the bellman's closet, and turning over their own valuable personal property. Miller-El and Flowers then bound and gagged the victims. After Flowers left the scene, Miller-El shot Hall and Walker twice each in the back as they lay face down in the bellman's closet. Hall survived to testify at Miller-El's trial, although Miller-El's shots had severed his spine, rendering him a paraplegic. Walker died on the bellman's closet floor.

Miller-El was indicted for capital murder. Jury selection took place over a span of five weeks in February and March of 1986. During this process, prosecutors peremptorily struck fourteen venire members, ten of whom were African-American. Miller-El objected to eight of these strikes,[2] asserting that prosecutors were discriminating against African-American venire members based on race in violation of the Equal Protection Clause of the Fourteenth Amendment. As to each African-American panelist challenged, the State proffered its race-neutral, case-related reasons for exercising the challenge.[3] The jury finally selected consisted of two white males, seven white females, an African-American male, a Filipino-American male, and a Latino male.

Miller-El then filed a motion to quash the jury panel based on this Court's opinion in *Swain v. Alabama*, 380 U.S. 202 (1965),[4] arguing that the prosecution had violated the Equal Protection Clause of the Fourteenth Amendment by excluding African-Americans through the use of peremptory challenges. At a pretrial hearing on the motion, Miller-El presented evidence regarding historical jury selection practices in the Dallas County District Attorney's Office. *See*, Joint Appendix (JA) 723.[5] At the conclusion of the hearing, the trial judge found that there was no evidence presented indicating any systematic exclusion of African-Americans as a matter of policy by the District Attorney's Office and that Miller-El had failed to establish a *Swain* violation.

The case proceeded to trial and Miller-El was convicted of capital murder on March 26, 1986. One month later, this Court issued its opinion in *Batson*. On direct appeal, Miller-El challenged his jury selection under the *Batson* standard. The Texas Court of Criminal Appeals found that Miller-El had established a prima facie claim under *Batson's* first step based on the disproportionate number of African-Americans stricken. *Miller-El v. State*, 748

---

[2] Miller-El did not object to State's strikes of venire members Joe Warren and Paul Bailey contemporaneous with the strikes.

[3] With the exception of venire members Warren and Bailey, *see* Note 2, *supra*, the State set forth its race-neutral reasons for exercising these peremptory challenges immediately after exercising the strikes. At the subsequent *Batson* hearing, the State merely asked that the trial judge take judicial notice of that prior testimony. Transcript of Batson Hearing ("BH") 12. Because defense counsel did not object to the State's exercise of strikes against Warren and Bailey contemporaneous with the strikes, the State did not give its race-neutral reasons until the subsequent *Batson* hearing.

[4] Miller-El's trial took place before this Court's decision in *Batson*; therefore, *Swain* represented the precedent controlling a claim that prosecutors exercised peremptory strikes in a purposefully discriminatory manner.

[5] References are to the Joint Appendix filed with the merits briefs in this Court in *Miller-El v. Cockrell*, No. 01-7662.

S.W.2d 459, 460 (Tex. Crim. App. 1988). The case was remanded to the trial court with instructions to conduct a *Batson* hearing. *Id.* at 460-61.

At the *Batson* hearing, conducted on May 10, 1988, the defense relied on the evidence it had presented at the *Swain* hearing without offering any trial-related evidence more applicable in a *Batson* context.[6] JA 840. The State objected to its admission, arguing that the evidence was irrelevant under *Batson* since it did not bear on the prosecutor's conduct in Miller-El's case. JA 842. The court overruled the State's objection, however, and admitted the evidence, commenting that "[w]hat weight, if any, I will give it, I certainly reserve for myself." JA 843. Prosecutors testified regarding their reasons for striking venire members Paul Bailey and Joe Warren, for whom no reasons had been given at trial,[7] and the State asked the court to take judicial notice of the explanations given during voir dire for its strikes of the remaining venire members. JA 866. Thereafter, the court issued written findings, determining that the prosecution's explanations were race-neutral and negated any inference of purposeful discrimination. JA 873-878.

Miller-El challenged these findings on direct appeal. The Texas Court of Criminal Appeals, after independently reviewing the voir dire and the supplemental record, found that the record contained "ample support" for the prosecutor's racially neutral reasons and concluded that the prosecutor's explanations were not "patently implausible or so contrary to the evidence as to be unworthy of belief as a matter of law." JA 881.

Miller-El advanced his *Batson* claim again in his federal habeas corpus petition. A United States magistrate judge recommended denying habeas corpus relief, concluding that

---

[6] Miller-El did not advance his disparate treatment and disparate questioning arguments until federal habeas corpus proceedings. Nonetheless, the state trial court specifically found, based on its own recollections and on its review of the entire voir dire record, that the prosecutors did not engage in disparate treatment or disparate questioning based on race. *See* JA 878.

[7] Defense counsel had failed to object to the State's exercise of peremptory strikes against Bailey and Warren at the time of the strikes; therefore, the State had not offered race-neutral reasons.

the record supported the trial judge's finding that Miller-El had failed to prove purposeful discrimination. JA 920. After conducting a de novo review of the magistrate's disposition and hearing arguments from counsel, the district judge denied relief based on the magistrate's findings and recommendation. JA 942. The court below denied Miller-El's request for a certificate of appealability. JA 961.

This Court granted Miller-El's petition for writ of certiorari to review the court of appeals' denial of a COA. 534 U.S. 1122 (2002). Then in an opinion issued on February 25, 2003, this Court concluded, based on a "threshold examination" of the record, that the federal district court's rejection of Miller-El's *Batson* claim was "debatable" and thus that the court below had erred in not granting a COA on the claim. Pet. App. 44a. The Court remanded the case to the court below to determine whether Miller-El could "demonstrate that [the] state court's finding of the absence of purposeful discrimination was incorrect by clear and convincing evidence, 28 U.S.C. § 2254(e)(1), and that the corresponding factual determination was 'objectively unreasonable' in light of the record before the court." Pet. App. 44a. Consistent with this directive, the court below granted COA, ordered full briefing on the merits from the parties, and conducted oral argument. Then on February 26, 2004, the lower court issued its opinion affirming the district court's denial of relief, concluding that Miller-El had "failed to show by clear and convincing evidence that the state court erred in finding no purposeful discrimination." Pet. App. at 22a. Miller-El's petition for writ of certiorari follows.

ARGUMENT

I. The Question Presented for Review Is Unworthy of the Court's Attention.

Supreme Court Rule 10 provides that review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only for compelling reasons. Rule 10(a) further provides that the Court, in deciding whether to exercise its discretion to grant review, may consider whether a court of appeals "has so departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power." SUP.

CT. R. 10(a) (cited in Miller-El's Petition at I). Finally, "[a] petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." SUP. CT. R. 10.

Miller-El's petition presents no compelling reason to justify this Court's exercise of its certiorari jurisdiction. Miller-El's assertions to the contrary, the lower court did not ignore the mandates of this Court's opinion; rather, it conscientiously followed the Court's directive, granting a certificate of appealability, ordering full merits briefing, conducting oral argument, and carefully reviewing the entire record and the briefing and arguments of the parties before affirming the district court's denial of relief. Furthermore, Miller-El concedes, as he must, that the lower court properly stated the law applicable to review of his claim; but, in any event, he has failed to show that the lower court misapplied *Batson* or 28 U.S.C. § 2254. Certiorari review should, therefore, be denied.

II. As the Court Below Correctly Determined, Miller-El Has Failed to Show That the State Courts' Rejection of His *Batson* Claim Is Unreasonable, Nor Has He Rebutted, by Clear and Convincing Evidence, the State Court's Finding of No Purposeful Discrimination.

In *Batson v. Kentucky*, this Court introduced a three-step evidentiary framework for evaluating claims of racial discrimination in jury selection. 476 U.S. at 96-98. First, the defendant must make a prima facie showing that the prosecutor has exercised peremptory challenges on the basis of race. *Id.* at 96-97. Second, if the requisite showing has been made, the burden shifts to the prosecutor to provide a race-neutral explanation for striking the venire member in question.[8] *Id.* at 97-98. Third, the trial court must determine whether the defendant has carried his burden of proving purposeful discrimination. *Id.* at 98. Under *Batson*, the ultimate burden of persuading the court that the State's peremptory challenges

[8] To satisfy the second part of the three-step analysis, the prosecutor need only give an explanation based on something other than race. *Hernandez v. New York*, 500 U.S. 352, 359 (1991). "Unless discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral." *Id.* Moreover, the reason offered need not rise to the level of a challenge for cause. *Batson*, 476 U.S. at 97.

are attributable to a discriminatory purpose lies with and never shifts from the defendant. 476 U.S. at 94 n.18 (citing *Texas Dept. Of Community Affairs v. Burdine*, 450 U.S. 248, 252-56 (1981)); *Purkett v. Elem*, 514 U.S. 765, 768 (1995).

Furthermore, a trial judge's factual finding at *Batson*'s third step is necessarily accorded great deference on appellate review. Even on direct review, a reviewing court may overturn a state trial court's finding on the issue of discriminatory intent only if it is convinced that the determination was clearly erroneous. *Hernandez v. New York*, 500 U.S. 352, 369 (1991) (plurality); *see also id.* at 372 (O'Connor, J., joined by Scalia, J., concurring) (agreeing with plurality that Court reviews for clear error trial court's finding as to discriminatory intent). And where, as here, the claim is before the Court on federal habeas review, the trial judge's determination must be upheld unless it is unreasonable; the trial judge's finding is presumed correct unless rebutted by clear and convincing evidence. 28 U.S.C. § 2254(d)(2), (e)(1). *See also Miller-El v. Cockrell*, 123 S. Ct. at 1041.

Miller-El concedes that the lower court correctly set forth these standards in its opinion. He argues nonetheless that the court merely paid "lip service" to the standards and did not actually properly apply them. Petition at 8. A review of the lower court's opinion belies this assertion. Indeed, Miller-El's conclusory argument that the lower court misapplied the legal standards applicable to his case devolves into merely a disagreement with the court's ultimate resolution of his claim.

Miller-El complains that the court below repeated errors contained in its original opinion vacated by this Court by failing to fully consider all relevant evidence, including that presented to support a prima facie case, and accepting "without question" the state trial judge's credibility determinations. But the lower court's opinion shows that it carefully reviewed the trial record and the evidence presented by Miller-El and determined that the evidence simply was not sufficient to compel rejection of the trial judge's finding of no purposeful discrimination. In making this determination, the lower court did not discount any evidence as irrelevant, and it carefully considered the evidence to determine whether it

impugned the trial court's finding. But in the final analysis, the court determined that the trial court's finding of no purposeful discrimination was supported by the record and that Miller-El's proffered evidence did not rebut that finding by clear and convincing evidence.

A. The record supports the trial judge's finding that prosecutors struck prospective jurors based on their views, not on race.

As the lower court concluded, the record supports the trial judge's finding that the challenged venire members were struck because of their case-related views, not because of their race. Throughout jury selection in this case, prosecutors followed a consistent voir dire strategy of identifying and removing prospective jurors who expressed opposition to or hesitancy about the death penalty. This strategy motivated the prosecutors' questioning of prospective jurors, their pursuit of for-cause challenges, and their exercise of peremptory challenges.

It was the divergence of views of minority versus non-minority veniremen, rather than any impermissible discriminatory purpose, that resulted in the racial disparity in the State's exercise of its peremptory strikes.[9] Plainly, the mere fact that the impact of the State's legitimate voir dire strategy bore more heavily on African-American veniremen does not prove purposeful discrimination. In addressing a *Batson* claim, a reviewing court "must keep in mind the fundamental principle that 'official action will not be held unconstitutional solely because it results in a racially disproportionate impact. . . . Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause.'" *Hernandez*, 500 U.S. at 359-360 (quoting *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 264-265 (1977)). *See also McCleskey v. Kemp*, 481 U.S. 279, 292 (1987) ("[A] defendant who alleges an equal protection violation has the burden of proving the existence of purposeful discrimination.").

A review of the challenged venire members' testimony on voir dire is instructive. Roderick Bozeman, the first African-American venire member interviewed, stated that while he believed in the death penalty as a general proposition, he thought it was only appropriate "if there's no possible way to rehabilitate a person," for instance, a "mentally disturbed" person or "a Manson type." JA 79. If he thought there was a chance the defendant could be rehabilitated, he did not think the death penalty was appropriate. JA 89. Furthermore, according to Bozeman, repeated criminal acts of violence would not necessarily indicate that a person was beyond rehabilitation. JA 79. Bozeman classified himself as the type of person who believes in the death penalty in principle, but who could not actually serve on a capital jury. JA 79-80. Finally, Bozeman stated that even if the evidence compelled "yes" answers to the special issues, he might refuse to answer the questions honestly in order to avoid imposing the death penalty. JA 90-91. The State exercised a peremptory challenge to remove Bozeman, citing his views on the death penalty and on rehabilitation, his "obvious hesitation" concerning his ability to override his personal feelings and answer the special issues according to the evidence, and his belief that a prior pattern of conduct would not be sufficient to render a defendant deserving of a death sentence.[10] JA 102.

Prospective juror Billy Jean Fields stated that he believed in the death penalty and could serve on a capital jury. JA 108, 111. However, after noting that the possibility of rehabilitation would be a factor he would consider in assessing a death sentence, Fields asserted his personal religious belief that no one is beyond rehabilitation. JA 118. As Fields concluded, ". . . I feel like, if a person has the opportunity to really be talked [to] about God and he commits himself, whereas he has committed this offense, then if he turns his life

---

[9] Of the veniremen called for jury service in this case, more than seventy percent of non-minority veniremen had no qualms about either the death penalty generally or their willingness to assess it in an appropriate case. Conversely, only two of fifteen African-American veniremen expressed no qualms about the death penalty.

[10] With the exception of venire members Joe Warren and Paul Bailey, *see* Note 11, *infra*, the State set forth its race-neutral reasons for exercising these peremptory challenges immediately after exercising the strikes. At the subsequent *Batson* hearing, the State merely asked that the trial judge take judicial notice of that prior testimony. JA 866-68.

around, that is rehabilitation. . . . I feel like when an individual has really been truly reached by someone reading the word of God to him and they are repentant and they do have a real act of contrition, they can be rehabilitated and that's been demonstrated." JA 118. Additionally, as reflected in both Fields' questionnaire and in questioning by the State, Fields' brother had served time numerous times in Dallas County for drug offenses. JA 124. The prosecution exercised a peremptory challenge to remove Fields, citing its concern that the prospective juror's deeply-religious belief in the rehabilitative capacity of all persons could impact his willingness to impose a death sentence and the fact that the juror's brother had been convicted of a felony. JA 131-133.

Venire member Joe Warren repeatedly answered questions posed by the prosecutor in a noncommital manner, indicating ambivalence about the death penalty and his ability to impose it. When asked whether he believed in the death penalty, Warren stated, "there are some cases where I would agree, you know, and there are others that I don't." VDR 3:1526.[11] When the prosecutor described the crimes defined as capital murder under Texas law and asked whether Warren felt the death penalty could be an appropriate punishment for such crimes, Warren responded, "Well, there again, I would say it depends on the case and the circumstances involved at the time." JA 139. When asked whether the death penalty serves a purpose, Warren answered, "Yes and no. Sometimes I think it does and sometimes I think it don't. Sometimes you have mixed feelings about things like that."JA 140. When asked whether he could make a decision between a life sentence and a death sentence, Warren equivocally replied, "I think I could." JA 142. When questioned about his ability to answer the future dangerousness special issue, Warren responded, "I suppose there's always that chance, but there again, you never know." JA 144. Finally, Warren stated, "Well, it's just like I said you know. There are cases, I mean, personally, that I feel I wouldn't want to personally be, you know, involved with it if I had a choice. . . ." JA 146.

---

[11] This response was edited from the joint appendix. *See* JA 137.

The State exercised a peremptory challenge to remove Warren. Subsequent to Miller-El's trial, at a hearing held in the trial court pursuant to *Batson v. Kentucky*, the prosecutor cited Warren's hesitation about imposing the death penalty and his inconsistent responses during voir dire as bases for his strike.[12] JA 857. The prosecutor also noted that Warren was struck relatively early in the jury selection process when the State still had several peremptory challenges remaining.[13] JA 855, 859. As the prosecutor observed, an attorney's strategy regarding the use of peremptory challenges necessarily changes as jury selection progresses: Early in the process, an attorney flush with challenges might feel free to strike a marginal juror; whereas, later in the process, the attorney must be more cautious in expending the precious remaining strikes. JA 856, 859, 862-63. According to the prosecutor, had Warren been examined when the State had only one strike remaining, the prosecutor would not have exercised a challenge to remove him.[14] JA 859.

While venire member Edwin Rand had indicated on his questionnaire that he believed in the death penalty, at the outset of individual voir dire he described capital punishment as a "touchy subject." JA 158. Further into the examination, the prosecutor asked Rand whether he would describe himself as (1) a person who believes in the death penalty and can serve as a juror and assess the death penalty if warranted; (2) a person who believes in the death penalty but for whatever reason cannot actually participate as a juror and be involved in assessing the death penalty; (3) a person who does not believe in the death penalty but

---

[12] Defense counsel did not object to the State's exercise of a peremptory strike against Warren contemporaneous with the strike. JA 154. Therefore, the State did not offer race-neutral reasons at that time.

[13] Warren was twenty-eighth of 108 venire members. JA 68. The State still had nine peremptory challenges remaining after exercising a challenge to remove Warren. JA 856.

[14] On cross examination by defense counsel, the prosecutor testified that he would have struck jurors Sandra Hearn and Fernando Gutierrez before Warren had they come up earlier in the process. JA 861-62.

could render a verdict according to the evidence; or (4) a person who does not believe in the death penalty and cannot participate as a juror in the assessment of a death sentence. JA 160. Rand described himself as falling "[p]robably in between the first two, sitting in the jury and being able to say, 'Okay, he's guilty,' and being able to do that. But again, somewhere along the line, I would probably think to myself, you know, 'Can I do this?' You know, right now I say I can, but tomorrow I might not." JA 161. The State exercised a peremptory challenge to remove Rand, citing his ambivalence about the death penalty generally and his ability to serve on a capital jury. JA 187.

Prospective juror Carrol Boggess also left the unmistakable impression that she was uncertain and hesitant about administering a death sentence. On her juror questionnaire, she answered affirmatively the question "Do you have any moral, religious, or personal beliefs that would prevent you from returning a verdict which would ultimately result in the execution of another human being?" Joint Lodging ("JL") 44. During individual voir dire, when asked about her views concerning the death penalty, Boggess responded, "Well, I believe I could serve on a case like this, but whether I want to or not is a different thing. I wouldn't want to serve and I wouldn't want to have that responsibility to do that, but if it fell upon me, I would certainly take it and pray to the Lord to help me get through it." JA 192. Later she stated, "I'm not saying that I feel like I could impose the sentence myself – or I'm not going to be imposing the sentence, is that correct?" JA 194. After that, when asked whether she could vote for death, she stated, "I've never been in that situation. I don't feel like I would want to be in that situation and whether I could do it or not, I'm not real sure." JA 196. Then Boggess stated, ". . . but now whether or not I could actually go through with *murder* – with killing another person or taking another person's life, I just don't know. I'd have trouble with that." JA 197 (emphasis added). Additionally, Boggess had indicated on her juror questionnaire that she had testified as a defense witness at her nephew's theft trial. JL 43. The State exercised a peremptory challenge to remove Boggess, citing as reasons for the strike her hesitancy about assessing a death sentence and the fact that she had served as

a defense witness in her nephew's theft trial. JA 211.

Venire member Wayman Kennedy stated on his juror questionnaire that he believed in the death penalty "only in extreme cases." JL 51. He echoed that sentiment during individual voir dire, stating that he really only believed in the death penalty for mass murders or cases involving mutilation. JA 216. Kennedy questioned whether the death penalty could be appropriate punishment for a murder committed in the course of a robbery: "To me, it would like, if it was just a normal robbery, why wouldn't a life sentence be enough. . . ." JA 217. Finally, when asked whether he could answer the special issues "yes" if proved beyond a reasonable doubt, even if he personally felt the defendant should not be sentenced to death, Kennedy replied, "I think I could. . . ." JA 225. The State exercised a peremptory challenge to remove Kennedy, citing his hesitancy to assess the death penalty for murder in the course of robbery (for which Miller-El stood accused), his view that the death penalty is only appropriate for mass murder, and the fact that "he hesitated for a great deal of time" before stating that he could answer the special issues according to the evidence. JA 248-249.[15]

Thus, all but one of the challenged venire members expressed ambivalence or hesitance about the death penalty either in their juror questionnaires or during their voir dire examinations; in some instances, there were additional considerations that informed the State's strikes, such as pro-defense views on rehabilitation and the criminal histories of family members.[16] The one challenged venire member who had expressed no qualms about

---

[15] Miller-El does not challenge the State's strikes of the four other African-American venire members. It should be noted, however, that three of the four stated both in their juror questionnaires and during individual voir dire that they were opposed to the death penalty. Mackey (VDR 10:3949, 3951); Bailey (VDR 11:4110); Keaton (VDR 11:4307-08, 4314). They were held qualified under *Wainwright v. Witt*, 469 U.S. 412 (1985), nonetheless based on their statements that they could render a verdict according to the evidence. The fourth of these venire members expressed ambivalence about the death penalty and indicated both in her juror questionnaire and during individual voir dire that she could not personally assess a death sentence. Baker (VDR 8:2990-91, 2996-97, 2998).

[16] Furthermore, that some of the veniremen who expressed hesitancy about assessing a death sentence later claimed they would be able to assess the death penalty does not render the

the death penalty – Billie Jeans Fields – had expressed pro-defense views regarding rehabilitation and had a brother with an extensive criminal history in Dallas County. As the lower court determined, the voir dire record amply supports the trial judge's finding that prosecutors struck these jurors because of their case-related views, not because of their race.

Nonetheless, Miller-El repeatedly criticizes the court of appeals' "uncritical" acceptance of the trial judge's findings. In particular, he faults the court below for failing to acknowledge the two-year delay between voir dire and the *Batson* hearing. Petition at 11, 20-21. However, under the facts of this case, that delay does not necessarily impugn the trial court's credibility determinations. In its threshold review of this case, this Court commented that, because of this delay, "the evidence presented to the trial court at the *Batson* hearing was subject to the usual risks of imprecision and distortion from the passage of time." Pet. App. at 39a. However, as the Court also noted, prosecutors proffered their race-neutral reasons for all but one of the challenged strikes contemporaneous with the strikes. [17] *Id.* Indeed, at the subsequent *Batson* hearing, the State merely asked that the trial judge (the same trial judge who had presided over the voir dire) take judicial notice of that prior testimony. This case therefore stands in marked contrast to other cases tried during the same time period in which prosecutors were not required to proffer their reasons for strikes until years after the voir dire at issue took place. *See, e.g., Chambers v. States*, 784 S.W.2d 29 (Tex. Crim. App. 1989). Thoughat the time of voir dire, *Swain* did not require the trial judge

---

prosecutors' strikes illegitimate. While these affirmations effectively insulated them from a challenge for cause, a prosecutor's explanation "need not rise to the level justifying exercise of a challenge for cause." *Batson*, 476 U.S. at 97. A prosecutor is certainly allowed to conclude that a prospective juror's initial indecision may not bode well for the State. *See Caldwell v. Maloney*, 159 F.3d 639, 655-56 (1st Cir. 1998) ("[T]he prosecutor had no obligation either to ignore [the prospective juror's comments about her reluctance] or to accept at face value [the prospective juror's] prediction that, in the end, [she] could put aside [her] problem and do it right.").

[17] Because defense counsel did not object to the State's exercise of strikes against Warren and Bailey contemporaneous with the strikes, the State did not give its race-neutral reasons until the subsequent *Batson* hearing.

to engage in the three-step analysis later espoused in *Batson*, the record in this case shows that the trial judge was presented with the defense's objection to the strikes and the State's race-neutral reasons for the strikes contemporaneous with and in the context of the voir dire process.

The deferential treatment of the trial judge's determination is grounded in the obvious advantage he has over reviewing courts in assessing the facts. He has witnessed the entire jury selection process as it has unfolded, in this case over the expanse of more than a month. He has had the unique advantage of observing the demeanor of both prosecutors and prospective jurors. Indeed, in the *Batson* context, the trial judge is essentially a witness to the very conduct alleged to be discriminatory. The credibility of the prosecutor is the deciding factor in a *Batson* claim, *Batson*, 476 U.S. at 98 n.21, and "evaluation of the prosecutor's state of mind based on demeanor and credibility lies 'peculiarly within the trial judge's province.'" *Hernandez*, 500 U.S. at 365 (quoting *Wainwright v. Witt*, 469 U.S. 412, 428 (1985)). Equally critical to the trial judge's appraisal of the prosecutors' credibility is the trial judge's observations of veniremen. "The manner of the juror while testifying is oftentimes more indicative of the real character of his opinion than his words. That is seen below, but cannot always be spread upon the record." *Patton v. Yount*, 467 U.S. 1025, 1037 (1984) (citation and quotation omitted). Thus, a trial judge's ability to witness prospective jurors' "[d]emeanor, inflection, [and] the flow of the questions and answers" places him in the best position to gauge whether the prosecutors' reasons for striking particular jurors were credible or pretextual. *Id.* at 1038 n.14. These principles apply with equal force here where the trial judge was presented with the defense objections to strikes and the State's reasons for strikes during the voir dire process.

B. Miller-El has failed to identify any white jurors accepted by the State who were similarly situated to the African-American jurors struck by the State.

Significantly, as the lower court found, Miller-El's argument that the State treated similarly situated white veniremen differently is not borne out by the evidence. While this Court's threshold inquiry into this case led it to note that "three of the State's proffered race-neutral rationales for striking African-American jurors pertained just as well to some white jurors who were not challenged and who did serve on the jury," Pet. App. at 39a, further scrutiny of the record revealed that the State approached similarly situated veniremen on equal grounds based on their individual views and circumstances, and not based on race. Miller-El's assertions to the contrary ignore the voir dire record as a whole and the reality of a jury selection process that requires litigants to assess innumerable variables and intangibles in exercising their peremptory challenges.

Disparate treatment cannot be imputed in every situation where the State rejects one venire member with the same characteristics as another venire member who is accepted. Indeed, the decision to strike a particular panelist "may be influenced by intuitive assumptions that are not fatally suspect merely because they are not quantifiable." *United States v. Lance*, 853 F.2d 1177, 1181 (5th Cir. 1988). *See also Matthews v. Evatt*, 105 F.3d 907, 918 (4th Cir. 1997) (noting that both prosecutor and defense counsel must be allowed to make credibility determinations when exercising peremptory challenges).

But even on a cold record it is clear that prosecutors approached similarly situated panelists on equal grounds. The State pursued challenges for cause to remove numerous non-minority panelists who had expressed opposition to or ambivalence concerning the death penalty.[18] The State secured the excusal by agreement of two additional non-minority venire

[18] Nelson (Voir Dire Record (VDR) 2:663); Sohner (VDR 2:716-17); Berk (VDR 3:1478); Hinson (VDR 4:1696); White (VDR5:2101); Willard (VDR 8:3153).

members who had expressed opposition or ambivalence.[19] Finally, when challenges for cause were unavailing, the State peremptorily struck three non-minority venire members who had expressed opposition to or ambivalence concerning the death penalty.[20] Significantly, the State also peremptorily struck a non-minority venire member who had expressed a firm belief in the death penalty but who also stated that she would probably not assess a death sentence if she believed there was a chance the defendant could be rehabilitated.[21]

None of the non-minority venire members who were selected to serve on Miller-El's jury shared views or circumstances comparable to those of the challenged African-American panelists. Miller-El points to prospective juror Fields as an African-American panelist similarly situated to white panelists not struck by the State. *See* Petition at 22. He likens Fields – who was struck by prosecutors based on their concern that his deeply-religious belief in the rehabilitative capacity of all persons could impact his willingness to impose a death sentence and the fact that his brother had been convicted of a felony – to white panelists Sandra Hearn, Kevin Duke, and Noad Vickery. But the comparisons do not withstand scrutiny.

Sandra Hearn stated firmly both in her juror questionnaire and throughout individual voir dire that she believed in the death penalty and could assess the death penalty in an appropriate case. VDR 11:4541, 4580-81. While she expressed a belief that someone should not be sentenced to death on a first offense,[22] she made it clear that the prior offense would not have to be a murder, it could be a robbery or some other lesser criminal act of violence. VDR 11:4541-43, 4562. Hearn stated unequivocally that she could base a death sentence on

[19] Girard (VDR 6:2542, 2575); Evans (VDR 6:2638).

[20] Gibson (VDR 2:485, 523); Holtz (VDR 2:1018-19); Whaley (VDR 10:3748).

[21] Crowson (VDR 3:1211).

[22] As Hearn stated, "I think when a murder is committed, whether it is purposely or – a sixteen year old boy or something, this is his first offense, no I do not believe in the death penalty there. I think that he ought to be given a chance to have rehabilitation." VDR 11:4583-84.

the facts of the crime and evidence of prior violent crimes. *Id.* She stated that she personally felt the death penalty should be available for not only murder, but also severe torture and extreme child abuse. VDR 11:4544. Hearn also volunteered that she had a great deal of respect for police officers based on the facts that her father was a retired FBI agent and that she had daily contact with police officers through her employment. VDR 11:4570-72, 4578. Defense counsel apparently recognized that Hearn was a prosecution-prone venire member, submitting her for challenge for cause on numerous grounds.[23] VDR 11:4610. When the trial judge found her qualified, defense counsel objected to her being seated as a juror and asked for additional peremptory challenges.[24] Indeed, in arguing on direct appeal that the trial judge erred in denying that challenge for cause, defense counsel[25] wrote:

> **If ever – if ever** – there was a Venireperson that should have been excluded for cause from the Jury in this case, or any capital Murder Jury, it was Venirewoman HEARN. It is hoped that the Lord will save us from future jurors with her type of thinking and beliefs. . . . Appellant did not have any remaining Peremptory Challenges to use to exclude [] HEARN, who was truly an objectionable and unacceptable juror, from becoming the twelfth juror in Appellant's case. In fact, Appellant probably would have tried it with eleven, without MS. HEARN. Appellant therefore strongly asserts that severe and devastating harm can be clearly shown and established and is evidenced in the Record in this case in denying Appellant's Challenge for Cause to SANDRA HEARN.

Miller-El's Motion for Rehearing at 15-16 (filed in Tex. Crim. App. Nov. 30, 1992) (emphasis in original); *see also* Brief for the Appellant at 27-31(filed in Tex. Crim. App.

---

[23] Furthermore, as the prosecutor testified at the *Batson* hearing, Hearn may well have been struck by the State as a "marginal" juror had she been examined earlier in the jury selection process. JA 862.

[24] The defense had expended its last peremptory challenge to remove the previous venire member, Max O'Dell. VDR 11:4526.

[25] E. Brice Cunningham, who represented Miller-El at trial, also represented him on direct appeal.

Apr. 27, 1987) ("By no stretch of the imagination could MS. HEARNE be considered qualified as a fair juror in this case.").

Juror Kevin Duke also expressed clear support for the death penalty and confidence in his ability to assess it in an appropriate case, VDR 8:3264-66, and his positive views about rehabilitation were made not in the context of testing Duke's ability to assess a capital sentence, but in response to defense counsel's questioning of the juror's ability to disregard the possibility of parole in assessing the minimal allowable sentence (five years) for the lesser-included offense of simple murder. VDR 8:3313-14.

Fields' views concerning rehabilitation stand in sharp contrast to those of any other prospective juror of any race because his views were rooted in his deeply held religious belief *that all persons can be rehabilitated.* JA 118. Furthermore, Miller-El seems to fault the State for striking Fields when he "was more supportive of the death penalty than white jurors whom the State found qualified. . . ." Petition at 22. But he fails to acknowledge that Fields' general views regarding the death penalty were not the basis for the State's strike. Clearly, Fields favored the death penalty generally. But prosecutors were nonetheless concerned, based on Fields' firm belief that all persons can be rehabilitated, that he would not be a good State's juror.

And, of course, Fields' views on rehabilitation were not the only basis for the State's strike. Fields' brother had served in prison numerous times for drug convictions in Dallas County. JA 124. Miller-El seeks to compare these circumstances to those of white panelist Noad Vickery, but the comparison does not bear scrutiny.[26] Noad Vickery testified that his

---

[26] Miller-El faults the court below for "attempt[ing] to justify the prosecutor's disparate treatment of potential jurors who had a family member with a criminal history with distinctions based on the particular circumstances of the relative's criminal episode." According to Miller-El, "such distinctions were not made by the prosecutors at the time, and cannot now be used to rationalize the prosecutors' motives." Petition at 24 n. 4. Miller-El fails to acknowledge, however, that he did not raise his arguments of disparate treatment of similarly situated jurors until federal habeas corpus proceedings. Apparently, Miller-El would require prosecutors to distinguish every non-minority prospective not struck in anticipation of juror comparisons a criminal defendant may

sister had been arrested and had served time in a California penitentiary when he was a teenager. VDR 4:1601-02. Vickery was fifty years old at the time of jury selection. JL 65. These circumstances are qualitatively different from those of Fields. First, the incident Vickery related obviously occurred many years before Miller-El's trial, whereas Fields' voir dire indicated his brother's problems with the law were ongoing. Second, Vickery's sister's crime, conviction, and incarceration occurred in California; Fields' brother had served in prison in Texas for crimes committed in Dallas County, the prosecuting authority in Miller-El's case. Third, Vickery related a single criminal incident regarding his sister; Fields related that his brother had been involved in several crimes. Finally, Vickery was a teenager when the incident involving his sister occurred; Fields was an adult.

Miller-El further asserts that Vickery shared "the precise combination of reasons the State used to justify striking Fields," a relative with a criminal history and ambivalence regarding the death penalty. Petition at 25. But, as set forth above, the circumstances of these panelists' relatives' criminal backgrounds are hardly similar; and, again, the State's strike of Fields was not based on his views regarding the death penalty generally. Furthermore, basic voir dire strategy counseled that, even if the State judged Vickery to be a less-than-ideal juror, given the hostility between Vickery and Miller-El's counsel apparent even on a cold record, there was no need for prosecutors to expend a precious peremptory strike to remove a juror defense counsel surely would seek to remove. In fact, the defense submitted Vickery for challenge for cause on the basis that he could not assess the minimum sentence for the lesser-included offense of murder. VDR 4:1626. After the trial judge held that Vickery was qualified, the defense exercised a peremptory challenge to remove him from the panel, though he provided no reason for the strike. VDR 4:1632, 1635-36. Fields and Vickery were not similarly situated. As the court below correctly determined, the voir dire record as a whole does not support Miller-El's argument that prosecutors struck the

---

make in future appeals. *Batson* does not support such a requirement.

challenged panelists because of their race.[27]

C. Prosecutors did not engage in disparate questioning based on race.

The lower court also correctly found unavailing Miller-El's attempt to impute discriminatory intent to the prosecutors from their use of particular jury selection tactics. The fact that African-Americans were subjected to certain lines of questioning in disproportionate numbers is simply a function of the divergence of views between the African-American panelists and the non-minority panelists. While, as this Court noted, "[d]isparate questioning did occur," Pet. App. at 40a, the record supports the conclusion that this disparate questioning was not based on race.[28]

The record in this case reveals that the State's litmus test for prospective jurors was their views on capital punishment. This was the most significant motivating factor in not only its exercise of challenges for cause and peremptory challenges but also its questioning of prospective jurors. Prosecutors employed disparate questioning to ferret out veniremen whom they felt were ambivalent about imposing the ultimate punishment. They also

---

[27] Miller-El also faults the court below for failing to gauge the potential impact of disparate questioning on prospective jurors views. *See* Petition at 21. Specifically, as this Court noted, "if the use of disparate questioning is determined by race at the outset, it is likely a justification for a strike based on the resulting divergent views would be pretextual." Pet. App. 40a-41a. However, as set forth in subsection C, *infra*, the lower court concluded that prosecutors did not engage in disparate questioning based on race. This conclusion rendered unnecessary any evaluation of the impact of disparate questioning.

[28] Miller-El faults the state trial court for finding no disparate questioning. *See* Petition at 15. Significantly, however, Miller-El did not advance his disparate questioning argument until federal habeas proceedings. Nonetheless, the state trial court specifically found, based on its own recollections and on its review of the entire voir dire record, that "no disparate prosecutorial examination of any of the veniremen in question has been shown." This finding is properly interpreted, in context, as a finding that Miller-El had shown no disparate questioning *based on race*. Obviously, prosecutors did not use the same script of questions with all prospective jurors regardless of their views as reflected in their juror questionnaires and during voir dire examination. The trial judge was certainly aware of this but found, nonetheless, that Miller-El had failed to show disparate questioning based on race.

employed disparate questioning in attempts to disqualify veniremen who had expressed what prosecutors perceived to be unfavorable views but who were not subject to disqualification on those grounds. However, they did not employ disparate questioning based on race. Rather, prosecutors utilized these legitimate jury selection tactics, aiming to identify and remove prospective jurors who had expressed views unfavorable to the State.

As Miller-El asserts, the prosecution used divergent questioning methods in two areas: veniremen's feelings about the death penalty and veniremen's ability to impose the minimum punishment for the lesser-included offense of murder.

1. Graphic Script

The State questioned all prospective jurors at length regarding their views on capital punishment. With the vast majority of veniremen, prosecutors simply informed them that the State was actively seeking the death penalty and that affirmative answers by the jury to the three questions submitted at the punishment phase would result in Miller-El being given the death penalty, then asked them an open-ended question concerning their feelings on capital punishment. With some prospective jurors, however, prosecutors described an execution in vivid detail. Nonetheless, the record does not support Miller-El's argument that prosecutors' use of this "graphic script" was based on race.

The record reveals that the African-Americans questioned with the graphic script at the outset of their examinations had given ambiguous or conflicting responses regarding their views on the death penalty in their juror questionnaires. [29] Likewise, some non-minority jurors who had expressed similar reservations about the death penalty were questioned using the same graphic formulation. The record therefore supports the conclusion that the graphic script was used to probe jurors' views about the death penalty.

Miller-El asserts that, even taking the prospective jurors' views into account, the graphic script was used more frequently with African-American jurors than with non-

[29] The prosecutors' "graphic script" questioning took place at the outset of voir dire, thus it was based only on information contained in juror questionnaires.

minority jurors. However, Miller-El fails to acknowledge that the eight white veniremen who he thinks should have received the graphic script "were so emphatically opposed to the death penalty that such a description would have served no purpose in clarifying their position on the issue.[30] . . . The strategy pursued by the prosecution makes perfect sense: When it was necessary to draw out a venireman's feelings about the death penalty they would use the graphic script, but when it was overkill they would not." Pet. App. at 60a. The same holds true for the three death-penalty-opposed African-American jurors who did not receive the graphic script.[31]

Miller-El faults this theory as speculative given that the questionnaires of most white jurors are not part of the record. He asserts that this gap in the record is not attributable to him because he sought discovery of the remainder of the white jurors' questionnaires in federal district court "but was not granted access to this information." Petition at 17 n. 2. In fact, by the time Miller-El made his discovery request, the documents were apparently no longer in existence except for the seated jurors' questionnaires. Miller-El fails to explain why he did not make these documents part of the record *in state court* when the documents were unquestionably in existence and when he carried the burden of proving purposeful discrimination. Indeed, he did make the questionnaires of the peremptorily struck African-American panelists part of the record during the *Batson* hearing.

But in any event, the questionnaires that are part of the record – those of the twelve seated jurors and those of the ten prospective jurors for whom Miller-El originally raised Batson objections – support the conclusion that prosecutors used the graphic script to probe the views of prospective jurors who had given ambiguous or conflicting responses concerning their support for the death penalty on their questionnaires. Prosecutors did not

[30] Gibson (VDR 2:483); Nelson (VDR 2:603); Holtz (VDR 2:1016-17); Berk (VDR 3:1440-41); Hinson (VDR 4:1646); White (VDR 5:2053); Girard (VDR 6:2520-21); Willard (VDR 8:3090-91).

[31] V. Smith (VDR 2:926); Carter (VDR 4:1951-52); Mosley (VDR 7:2654-55).

generally utilize the graphic script when the panelists' support for *or opposition to* the death penalty was unambiguous.

The four African-Americans who did not receive the graphic script (whose questionnaires are contained in the record) – Bozeman, Fields, Warren, and Rand – all indicated unambiguous support for the death penalty in their questionnaires. [32] They all answered "yes" to question 56, stating they believed in the death penalty, and "no" to question 58, indicating that their beliefs would not prevent them from imposing a death sentence. It was not until subsequent voir dire examination that they expressed reservations.

The African-Americans who did receive the graphic script at the outset of their examinations had given conflicting answers on their questionnaires concerning their views on the death penalty. On her questionnaire, Carrol Boggess answered affirmatively the question "Do you have any moral, religious, or personal beliefs that would prevent you from returning a verdict which would ultimately result in the execution of another human being?" *See* DX 7. Wayman Kennedy stated on his questionnaire that he believed in the death penalty "only in extreme cases." *Id.* Linda Baker stated on her questionnaire "[m]y strongest feeling is against the death penalty" and wrote "undecided" in response to the question "Do you have any moral, religious, or personal beliefs that would prevent you from returning a verdict which would ultimately result in the execution of another human being?" *Id.* Troy Woods wrote "no" in response to the question "Do you believe in the death penalty?" *See* Exhibit 2 (questionnaires of seated jurors) attached to Miller-El's Supplemental Briefing on *Batson/Swain* Claim Based on Previously Unavailable Evidence (filed Dec. 8,1997), *Miller-El v. Johnson*, No. 3:96-CV-1992-H (N.D.Tex.). Janice Mackey wrote "no" in response to the question "Do you believe in the death penalty?" and added "Thou shall not kill." DX 7. In response to the question "Do you believe in the death penalty?" Paul Bailey circled "yes"

[32] Surely, if, as Miller-El suggests, prosecutors employed the graphic script to push African-Americans to express views that would subject them to challenge for cause, they would have used the graphic script on these panelists as well.

then wrote in "no." DX 7. Anna Keaton wrote "no" in response to the question "Do you believe in the death penalty?" DX 7.[33]

The seated jurors, whose questionnaires are also part of the record, further support this strategy. All who did not receive the graphic script – Sumrow, Long, Weiner, Mazza, McDowell, Duke, Walsh, Zablan, and Hearn – had answered questions 56 and 58 to indicate unambiguous support for the death penalty. Of the three seated jurors who did receive the graphic script, Gutierrez and Woods had given conflicting answers on their questionnaires concerning their views on the death penalty. Indeed, white juror Sztybel was the only juror who h[illegible]ambiguous support for the death penalty in her questionnaire but was [illegible]ed to the graphic script questioning. The record simply does not support Miller-El's assertion that prosecutors used the graphic script based on race.

2. Minimum Punishment

[illegible]estion African-Americans differently than non-minority veniremen concerning their willingness to impose the minimum punishment for the lesser-included offense of murder.[34] Again, prosecutors did utilize disparate questioning, but not based on race. With most veniremen, prosecutors identified the minimum penalty first, then asked whether the venire member could impose it. But with some, prosecutors employed a tactic by which they described the offense of murder, then asked what the prospective juror thought the minimum punishment should be, before informing him of the range allowed by law. However, the State did not engage in this divergent questioning based on race. The record shows that the prosecution employed this tactic with several veniremen, both African-

[33] Jeanette Butler's juror questionnaire is not contained in the record. However, her voir dire examination reveals that while she believed in the death penalty in principle, she was unwilling to participate as a juror in imposing a death sentence. VDR 4:1889.

[34] Unlike the "graphic script" questioning, which occurred at the outset of an examination, the minimum punishment questioning generally occurred toward the end of the examination; therefore, the State had not only the prospective juror's questionnaire to consider but also his previous voir dire responses.

BEST AVAILABLE COPY

American and not, who had expressed views that, while not rendering them subject to a challenge for cause, were unfavorable to the State.[35]

Miller-El points to the fact that the State used this line of questioning with seven of eight African-Americans questioned on the issue, but with only two of thirty-six white panelists questioned on the issue. But again, closer scrutiny of the record reveals that this disparity cannot be attributed to race. The record shows that the seven African-Americans who received this line of questioning – Rand, Kennedy, Bozeman, Warren, Boggess, Baker, and Fields – all expressed anti-prosecution views, but were not subject to challenge for cause on that basis. The one African-American who received the "friendlier" line of questioning was Troy Woods, whose voir dire clearly identified him as an excellent State's juror. On the other hand, almost all white panelists who had expressed opposition to the death penalty were struck for cause or by agreement of the parties *without the need to resort to this line of questioning*. The two remaining – Gibson and Holtz – were subjected to the same challenged line of questioning and were peremptorily struck, just like Rand, Kennedy, Bozeman, Warren, Boggess, Baker, and Fields.

As the lower court concluded, prosecutors utilized the legitimate tactic of disparate questioning to identify and remove prospective jurors who had expressed views unfavorable to the State. Therefore, Miller-El's arguments of disparate questioning do not serve to rebut the state trial court's finding of no purposeful discrimination in the State's exercise of peremptory challenges.

---

[35] Bozeman (VDR 1:307-312); Fields (VDR 1:432); Gibson (VDR 2:507-11); Holtz (VDR 2:1046-50); Warren (VDR 3:1545-50); Rand (VDR 4:1815-26); Boggess (VDR 4:2028-35); Kennedy (VDR 5:2194-2200); Baker (VDR 8:3007-08); Fernando Gutierrez (VDR 11:4396).

D. The lower court correctly concluded that Miller-El's evidence of historical discrimination in Dallas County and evidence of prosecutors' use of jury shuffles – while marginally relevant – was insufficient to compel rejection of the trial judge's finding.

Finally, contrary to Miller-El's assertions, the lower court did consider all the evidence proffered by Miller-El in support of his claim of purposeful discrimination – including the evidence proffered in support of his prima facie case – but concluded nonetheless that that evidence was insufficient to rebut the state trial judge's finding of no purposeful discrimination.

First, Miller-El errs in asserting that the court below "declined to consider the State's discriminatory use of jury shuffles, offering only the irrelevant observation that the defense had also requested shuffles." Petition at 14. The court did consider the evidence, but in the final analysis determined that it "does not overcome the race-neutral reasons for exercising the challenged peremptory strikes articulated by the prosecutors and accepted by the state court who observed the voir dire process including the jury shuffles." Pet. App. at 10a. In any event, Miller-El overstates the significance of the State's requests for jury shuffles and mischaracterizes the record in an attempt to portray the State as scheming to manipulate the jury shuffle process. He ignores the fact that the heart of the State's complaint to the defense's shuffle during the third week of jury selection was that defense counsel failed to thoroughly shuffle the juror cards. And he completely omits the fact that prosecutors voiced their complaint to the shuffle before they were even aware of the racial composition of the newly shuffled venire. Furthermore, the fact that a single unnamed prosecutor not involved in Miller-El's trial used the jury shuffle in a discriminatory manner in another case has little bearing on whether the prosecutors in Miller-El's case acted likewise. *See* Petition at 13-14. In any event, as the lower court concluded, any inference that can be drawn from such evidence cannot overcome the highly persuasive race-neutral explanations for the State's strikes, explanations which are supported by the record and were credited by the trial judge.

Second, the lower court did not, as Miller-El contends, discount the relevance of the

historical "pattern and practice" evidence presented by Miller-El in state court in support of his prima facie case.[36] *See* Petition at 11-12. Indeed, the court below described the evidence presented and noted that "the apparent culture of discrimination that existed in the past in the Dallas County District Attorney's Office and the individual discriminatory practices that may have been practiced during the time of Miller-El's jury selection by some prosecutors are deplorable." Pet. App. at 9a. The court specifically acknowledged, consistent with this Court's directive, that "[t]his historical evidence is relevant to the extent that it could undermine the credibility of the prosecutors' race-neutral reasons." Pet. App. at 10a. It concluded nonetheless that "the general historical evidence does not prove by clear and convincing evidence that the state court's finding of the absence of purposeful discrimination in Miller-El's jury selection was incorrect." *Id.*

Miller-El points out the fact, noted by this Court in its prior opinion, that the state trial judge did not specifically mention the historical "pattern and practice" evidence in his findings. Petition at 10 (citing Pet. App. 44a). However, the record belies Miller-El's contention that the trial judge failed to consider all the evidence properly before him, including the pattern and practice evidence admitted at the *Swain* hearing. At the *Batson* hearing, the trial judge admitted into evidence, over the State's objection on relevancy grounds, the Sparling paper and all the testimony regarding historical jury selection practices in Dallas County originally admitted at the *Swain* hearing.[37] The trial judge apparently determined nonetheless (as he was certainly entitled to do) that such circumstantial evidence

---

[36] Specifically, Miller-El asserts that the lower court refused to give this evidence any weight "because the court viewed it as relevant only to step one." Petition at 12. Review of the lower court's opinion belies this assertion.

[37] The trial judge clearly admitted the pattern and practice evidence over the State's objection on relevancy grounds. The mere fact that the trial judge did not specifically mention this evidence in his written findings is not a sufficient basis to assume that the trial judge did not consider the evidence. *See* Pet. App. 44a ("We adhere to the proposition that a state court need not make detailed findings addressing all the evidence before it.").

of discriminatory intent, which had no direct bearing on the actions of prosecutors in this case, was insufficient to prove purposeful discrimination in the face of the race-neutral, case-related reasons for the prosecutors' strikes documented abundantly by the record.

Miller-El also faults the court below for failing to address this Court's concern over the state trial court's determination – even in the fact of the pattern and practice evidence – that Miller-El had failed to establish a prima facie case under *Batson*. *See* Petition at 10 (citing Pet. App. 44a). However, in the merits briefing in the court below, the Director pointed out that the trial judge's findings themselves explain this seemingly insupportable determination: The finding of no prima facie showing was based not only on Miller-El's evidence but also on "the explanations for the exercise of the State's peremptory challenges offered at trial and at the retrospective *Batson* hearing." JA 873-878. The judge explained that his analysis was based on then-existing lower court precedent interpreting the *Batson* decision, which counseled that *Batson* "requires the trial court to consider the State's explanation of the manner in which it employed its challenges prior to making a final determination *as to whether a prima facie case exists. We must therefore direct our trial judges to consider the prosecutor's explanations as part of the process of determining whether a defendant has established a prima facie case of racially discriminatory use of peremptory challenges.*" *Id.* (quoting *State v. Antwine*, 743 S.W.2d 51, 64 (Mo. 1987)) (emphasis added). Thus, the trial judge essentially collapsed *Batson*'s first step of determining whether Miller-El had made a prima facie showing into *Batson*'s third step of determining whether Miller-El had proved purposeful discrimination. While the trial judge undoubtedly erred as a matter of law in doing so, this legal error (based on then existing precedent) does not in any way cast doubt on his ultimate determination that Miller-El failed to prove purposeful discrimination.

Miller-El's reliance on the state court opinion in *Chambers v. State*, 784 S.W.2d 29 (Tex. Crim. App. 1989), is also futile. Initially, the *Chambers* opinion was not even before the trial judge, so it had no bearing on the inquiry before the court below. *See* 28 U.S.C. §

2254(d)(2) (limiting federal court's review to discerning whether the trial judge's decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."). But even if the opinion were properly before the trial court, it would not impeach the trial judge's decision. Any inference that may be drawn from the mere fact that a prosecutor was involved in a single case, among hundreds he tried, that was reversed under *Batson* is insufficient to overcome the trial judge's finding that the State did not discriminate in this case. But in any event, to the extent the opinion indicates that these prosecutors discriminated against African-Americans in another case,[38] the opinions do little to prove that they did likewise in Miller-El's case, particularly in light of the undisputed race-neutral, case-related reasons for the strikes in this case.

Under *Batson*, the ultimate burden of persuading the court that the State's peremptory challenges are attributable to a discriminatory purpose lies with and never shifts from the defendant. 476 U.S. at 94 n.18 (citing *Texas Dept. Of Community Affairs v. Burdine*, 450 U.S. at 252-56); *Purkett v. Elem*, 514 U.S. at 768. Because Miller-El failed to satisfy his burden of proving discriminatory purpose, the trial judge found that the prosecutors did not act with discriminatory purpose. Miller-El's arguments on habeas review "rest on circumstantial evidence and speculation that does not hold up to a thorough review of the record." Pet. App. at 65a. Thus, as the lower court held, he has failed to demonstrate that this determination is unreasonable in light of the record, and has likewise failed to rebut the finding by clear and convincing evidence.

CONCLUSION

For the foregoing reasons, Miller-El's petition for writ of certiorari should be denied.

[38] It should be noted, however, that in *Chambers*, prosecutor Paul Macaluso was found responsible for striking only one of three African-Americans struck by the State. 784 S.W.2d at 31-32.

Respectfully submitted,

GREG ABBOTT
Attorney General of Texas

BARRY McBEE
First Assistant Attorney General

DON CLEMMER
Deputy Attorney General
For Criminal Justice

*GENA BUNN
Assistant Attorney General
Chief, Postconviction Litigation Division

* Counsel of Record

P.O. Box 12548, Capitol Station
Austin, Texas 78711
Tel: (512) 936-1400
Fax: (512) 320-8132
Email: gena.bunn@oag.state.tx.us

ATTORNEYS FOR RESPONDENT